STATE OF MICHIGAN

COURT OF APPEALS

RODNEY HOOVER and MAXINE HOOVER, Conservators of the Estate of MICHAEL HOOVER, a Developmentally Disabled Person,

Plaintiffs-Appellees,

v

MICHIGAN MUTUAL INSURANCE COMPANY, f/k/a AMERISURE,

Defendant-Appellant.

FOR PUBLICATION
December 11, 2008

No. 278237
Genesee Circuit Court
LC No. 86-085769-NZ

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the conclusion reached by my distinguished colleagues, Judges Murphy and Fitzgerald, that the 28 percent allocation ordered by the trial court was not legally sound and was arbitrary. I also concur that there is no basis for awarding defendant attorney fees because plaintiffs' claims were not fraudulent.

I respectfully dissent, however, from the majority's expansive application of *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005) to this case. I do not believe plaintiffs are entitled to payment for any cost other than those for the backup generator, medical pendant services, and the television monitoring system. I also respectfully dissent from the majority's opinion that defendant unreasonably refused or delayed payments for any costs other than the generator, television monitoring system, and medical pendant service. Therefore, I would reverse and remand for recalculation of the awards to which plaintiffs are entitled.

Under the *Griffith* Court's interpretation of §§ 3105(1) and 3107(1)(a), an insured's housing costs are compensable provided such are affected by accidental injuries arising out of the operation of a motor vehicle that are reasonably necessary for the insured's "care, recovery, or rehabilitation." *Id*. at 530.

At the outset, I agree with the majority that the trial court erroneously allocated 28 percent of the cost of plaintiffs' home as directly related to Michael's custody and care. In arriving at 28 percent, the trial court relied upon the parties' agreement on accommodations and found that defendant contributed $200,000 towards construction costs of the handicap accessible home – or roughly 28 percent of the total cost of the $700,000 home. However, this figure

merely represents a settlement agreement between the parties regarding defendant's contribution to construction costs for "any and all accommodations reasonably necessary for Michael Hoover's care, recovery and rehabilitation." The fact that nearly 28 percent of the construction costs constituted accommodations for Michael does not mean that 28 percent of the home is apportioned to Michael, or that care related to Michael's injury constitutes 28 percent of the cost of certain items for which the court awarded costs. Similarly, despite plaintiffs' assertion that 28 percent is the proper apportionment because Michael uses 2,000 square feet of the 7,200 square foot home, the amount of space Michael uses cannot alone account for the apportionment of the home related to care for his injuries that resulted from the accident. Indeed, Michael would require space to live in a house regardless of the injuries he sustained in the accident. In other words, the expense of living in a house is not, *per se*, causally related to the injuries at issue. Consequently, the trial court improperly attributed 28 percent of the home to Michael's use.

Given this, the court's awards apportioned at 28 percent were arbitrary. First, the award of 28 percent of plaintiffs' real estate taxes in no way accounts for the home's appraisal value. The fact that defendant contributed 28 percent of the cost of the home does not explain the extent to which facilities constructed for care of Michael's injuries caused by the accident affected the tax appraisal. Second, no evidence was presented concerning the percentage of plaintiffs' utility bill, maintenance costs (including water softener, well, septic system, roof, structural, and general maintenance and repair), and telephone bill that are attributable to Michael's care necessitated by his injuries. Indeed, irrespective of his injuries, plaintiffs would be required to pay taxes, utilities, maintenance costs, and telephone bills.

Further, allocation of 28 percent of the security system expenses and homeowners insurance to defendant was wholly improper. Regarding the security system, Rodney testified that this system is used for crime prevention and helps Michael's nurses feel safer. The system is not reasonably necessary for Michael's care, recovery or rehabilitation.[1] Similarly, homeowners insurance is completely unrelated to Michael's care, recovery or rehabilitation. Again, plaintiffs would bear the cost of such insurance irrespective of his injuries.

Moreover, the trial court improperly awarded plaintiffs 100 percent of the cost for the dumpster, elevator maintenance, and Maxine's cleaning and snow removal. First, although Michael generates two to three bags of garbage per day, the court's finding that the dumpster is "solely for Michael's waste" was clearly erroneous given Rodney's testimony that this expense covers waste removal for the entire household, as well as testimony that use of the dumpster is also necessitated by the fact that the house is 2,500 feet from the road. Use of the dumpster is not reasonably necessary for Michael's care, recovery, or rehabilitation. Second, regarding elevator maintenance costs, although Rodney testified that the elevator permits Michael access to the basement in the event of a weather emergency, the need for access to a basement due to weather conditions is not causally related to Michael's injuries. Third, while Maxine explained

---

[1] Rodney testified the ADT security system was used predominantly to "keep an eye on Michael." However, in context, it appears Rodney was referring to the television monitoring system, also provided by ADT. Defendant does not dispute the court's award for that expense.

that she performs "serious" daily cleaning of Michael's room (including vacuuming, mopping and sweeping floors, and cleaning the tub, walls, and windows), evidence was not presented that such cleaning is causally related to Michael's injuries. Further, Maxine admitted that a portion of her cleaning results from the mess left by Michael's nurses. Moreover, removing snow from a driveway is completely unrelated to the injuries at issue. Indeed, plaintiffs would need to remove snow from the driveway irrespective of Michael's injuries. Consequently, the only costs I find the trial court properly awarded were those for the backup generator, medical pendant services, and television monitoring system.

Further, I agree with defendant that the court erred in awarding plaintiff attorney fees and penalties and in failing to address defendant's request for attorney fees. "The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits. The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). A trial court's award of interest under the no-fault statute is reviewed de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 316, 319; 602 NW2d 633 (1999).

Under MCL 500.3148(1), an attorney representing a claimant may recover fees where an insurer's personal protection insurance benefit payment is overdue, and the fee "shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." "When determining whether attorney fees are warranted for an insurer's delay to make payments under the no-fault act, a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Attard*, *supra* at 317.

With the exception of payments defendant concedes plaintiffs legitimately claimed (i.e., payments for the generator, television monitoring system, and medical pendant service), defendant did not unreasonably delay payments. Indeed, as noted, *supra*, factual uncertainty existed regarding the 28 percent apportionment of the house as directly related to care of Michael's injuries. Additionally, plaintiffs were not entitled to costs for the security system, homeowners insurance, dumpster, elevator maintenance, or Maxine's cleaning and snow removal. Thus, I believe that the trial court should recalculate attorney fees with respect to the items defendant conceded were appropriate.

Defendant also contends that the trial court erred in awarding plaintiffs interest under MCL 500.3142(2). I agree in part. "[T]he no-fault interest statute requires an insurer to pay simple interest of twelve percent for personal protection insurance benefits that are not paid within thirty days 'after an insurer receives reasonable proof of the fact and of the amount of loss sustained.'" *Attard*, *supra* at 319, quoting MCL 500.3142(2). "[N]o-fault interest is intended to penalize an insurer that is dilatory in paying a claim." *Id*. at 320. As noted, *supra*, defendant was only dilatory in providing payment for the generator, television monitoring system, and medical pendant service after notice was provided within the statutory time frame. Whether defendant owed additional payments was, at best, uncertain. Thus, interest was only appropriate for late payment regarding these items.

I would reverse and remand for the trial court to award costs and recalculate attorney fees and penalties.

/s/ Bill Schuette